

THE FIRST  
**Supreme Court of the United States**

October Term, 1857

No. 400

George H. Davis, Plaintiff:

vs.  
Estate of George H. Davis, Defendant.

George H. Davis, Plaintiff:

vs.  
The 1st. Div. of the District Judge.

On Writ of Habeas Corpus in the United States Court of Appeals  
for the Fifth Circuit:

**PETITIONER'S BRIEF**

Presented by  
The Plaintiff

George H. Davis

100 of 1000000

Witness H. Davis  
Witness E. Davis  
Witness H. Wilson, Jr.  
Witness H. Jones  
Witness H. Brown

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IN THE  
**Supreme Court of the United States**

October Term, 1955

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No. 320

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GEORGE B. PARR, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

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GEORGE B. PARR, *Petitioner*

v.

BEN H. RICE, *District Judge*

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On Writ of Certiorari to the United States Court of Appeals  
for the Fifth Circuit

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**PETITIONER'S BRIEF**

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I.

**OPINIONS BELOW**

The opinion of the Court of Appeals is reported in 225 F. 2d 329. The opinion of the District Court for the Southern District of Texas transferring the indictment from the Corpus Christi Division to the Laredo

Division is reported in 17 F. R. D. 512 (R. 8). His oral opinion dismissing that indictment has not been reported. It is printed at R. 78.

## II.

### JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254 (1). The judgment of the Court of Appeals was rendered on July 13, 1955 (R. 92). The petition for writ of certiorari was filed on August 12, 1955. The writ was granted on October 17, 1955 (R. 132).<sup>1</sup>

In *Parr v. Rice* and *Parr v. Allred*, No. 202 Misc., October Term, 1955, petitioner also applied for prerogative writs in this Court to compel trial in Laredo. This Court has jurisdiction to issue the writs under 28 U.S.C. § 1651.

## III.

### STATUTES AND FEDERAL RULES OF CRIMINAL PROCEDURE INVOLVED

28 U.S.C. § 1651:

“(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”

28 U.S.C. § 1291:

“The courts of appeals shall have jurisdiction of appeals from all final decisions of the district

<sup>1</sup> The Court's order granting certiorari reads in part as follows: “The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case will be heard on the merits and on the question of appealability.”

courts of the United States . . . except where a direct review may be had in the Supreme Court."

"RULE 21. TRANSFER FROM THE DISTRICT OR DIVISION FOR TRIAL.

"(a) *For Prejudice in the District or Division.* The court upon motion of the defendant shall transfer the proceeding as to him to another district or division if the court is satisfied that there exists in the district or division where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that district or division.

"(b) *Offense Committed in Two or More Districts or Divisions.* ~~The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged.~~

"(c) *Proceedings on Transfer.* When a transfer is ordered the clerk shall transmit to the clerk of the court to which the proceeding is transferred all papers in the proceeding or duplicates thereof and any bail taken, and the prosecution shall continue in that district or division."

"RULE 48. DISMISSAL.

"(a) *By Attorney for Government.* The Attorney General or the United States Attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant."

## IV.

**QUESTIONS PRESENTED**

1. When the Government obtains an indictment in a venue where the defendant cannot get a fair trial and for that reason the trial court, on motion of the defendant, following a hearing and consideration of evidence, transfers the case to a venue where it finds neither side will be at a disadvantage, does the Government have the privilege of avoiding trial in the division to which the case has been transferred by obtaining another indictment charging the identical offense in another venue and then dismissing the transferred indictment?

2. Is an order and judgment by a trial court dismissing a transferred indictment a final judgment within the terms and provisions of 28 U.S.C. § 1291? Is it an appealable order within the rule of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)?

3. May writs of mandamus and prohibition issue from a court of appeals to require that "the prosecution . . . continue" pursuant to Rule 21(c), F.R. Crim. P., in the district and division to which a first indictment was transferred by order of court on defendant's motion, rather than in another district and division selected by the prosecution by the device of a second indictment?

## V.

**STATEMENT OF THE CASE**

This case involves an attempt by the Government to circumvent an order of transfer entered by a court under the provisions of Rule 21(a) of the Federal Rules of Criminal Procedure.

Petitioner Parr is a prominent figure in the State of Texas. For some years prior to the institution of this proceeding, he had been subjected to heated newspaper attacks on his honesty and character, particularly in the Corpus Christi Division of the Southern District of Texas (R. 14-16, 119-122).

The City of Austin, Texas, is headquarters for the First Internal Revenue Collection District of Texas. The City of Corpus Christi is located in that District. For the last twenty years, the Government has filed all tax evasion cases arising in that District in Austin (R. 38).

However, on November 15, 1954, the Government departed from this practice of more than two decades and, in the Corpus Christi Division of the Southern District of Texas, procured an indictment charging petitioner in three counts with evasion of income taxes (R. 1).

Petitioner filed a motion under Rule 21(a) of the Federal Rules of Criminal Procedure to transfer that indictment on the ground that he could not obtain a fair and impartial trial at Corpus Christi (R. 119). The Government strenuously opposed the change (R. 13-14, 123-131). After extensive hearings and consideration of more than one hundred affidavits and perhaps five hundred newspaper clippings from the Corpus Christi press (R. 78), on April 27, 1955, District Judge Kennerly filed an opinion concurred in by District Judge Allred (R. 8-19), specifically finding that (R. 15):

*"A preponderance of the evidence reflected by such affidavits—and I have no doubt on the subject and find—that there exists in the Corpus Christi Division of the Court so great a prejudice*

*against Defendant that he cannot obtain a fair and impartial trial in this case in such division.*" (Italics added)

Judge Kennerly transferred the case to the Laredo Division of the Southern District of Texas (R. 29). The United States Attorney had argued that a transfer to that Division would "handicap" the prosecution (R. 18). Judge Kennerly rejected this contention and specifically found that trial in Laredo would in no way prejudice the Government (R. 19):

*"Basing my findings, as I must, wholly on all the affidavits, I do not think that the evidence shows that the Government either will or might 'be under a severe handicap' in the prosecution of this case as claimed. I find to the contrary."* (Italics added)

The Government did not seek review of the transfer order. However, it soon became apparent that the Government had no intention of conforming to the court's ruling that trial should be had in Laredo. On May 3, 1955, six days after the aforementioned opinion was filed and actually prior to the formal entry of the transfer order (R. 29), the Department of Justice in Washington authorized the local United States Attorney to dismiss the Southern District indictment if an identical indictment could be obtained in the Western District (R. 20).<sup>o</sup> On the same day, the United States Attorney obtained an indictment in the Western District which was identical with the indictment which had been transferred to Laredo (R. 111).

The very next day, on May 4, 1955, the United States Attorney filed his motion in the Laredo court to dismiss the first indictment under Rule 48(a) of the Federal Rules of Criminal Procedure (R. 19), to

which was attached his authorization and the second indictment. His Statement of Reasons for Dismissal (R. 22) recited that the Government had originally chosen to prosecute petitioner in Corpus Christi; that the choice was made prior to the transfer order; but that the "recent decision of the Court to transfer venue from Corpus Christi to Laredo" had disturbed the Government's "over-all appraisal" of the strategy of the proceeding (R. 22-24). Laredo, it reiterated, was unsatisfactory to the Government (R. 23):

"At the present time, because of new factors introduced in the situation, the Attorney General believes that prosecution should be had in the Western District of Texas and has initiated action accordingly."

On May 16, Judge Kennerly conducted an inquiry into the reasons for the dismissal, received testimony by Government counsel and heard argument (R. 34-77). The Government did not and could not disguise the fact at this hearing that its objective was to nullify the court's order entered after full hearing, fixing Laredo as the place of trial. The United States Attorney stated that the Government had brought an indictment "similar in all respects" in the Western District (R. 39). He said that the Government did not want to proceed in Laredo because, despite the court's finding that it would not be handicapped in that forum, it anticipated difficulty in eliciting the testimony of witnesses (R. 41).

The Government summarized its position as follows (R. 53):

"I think it has been very clear from several documents we have filed that we would have preferred

the case to remain in Corpus Christi, and it is certainly clear from the action of the Attorney General and myself that the Attorney General prefers that the case go to Austin ..."

Petitioner vigorously opposed the dismissal. He argued that the sole purpose of the dismissal was to nullify the order transferring the case to Laredo. The Government, he said, could not thus circumvent an order duly entered, and could not by this method secure for itself a right to transfer the case which is not allowed by the rules. He urged the court, pursuant to its power under Rule 48(a), to deny the motion (R. 60-77).

Judge Kennerly ruled from the bench that he was compelled to grant the motion (R. 78-80). He held in effect that during 24 years on the bench he had never "hesitated to dismiss a case when requested by the Government" (R. 79). He added that:

"If I have a discretion under the rules now as to whether this case should or should not be dismissed, I *must* exercise that discretion and allow it to be dismissed ..." (Italics added) (R. 79).

Petitioner duly appealed to the Court of Appeals for the Fifth Circuit from the order of dismissal (R. 81).

Pending that appeal, petitioner filed his motion to stay proceedings on the second indictment which had been brought in the Austin Division of the Western District (R. 113). This was denied by that court on June 7, as was a motion to dismiss the second indictment on June 13 (R. 87). On June 29, the court also denied a motion under Rule 21(b) that the second indictment be transferred to Laredo in the interest of justice (R. 88). The motions were based on the contention that trial in

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Austin should not go forward on an offense identical with that charged in the previous indictment which had been validly and effectively transferred to Laredo. Following denial of these motions in the Austin court, petitioner sought writs of prohibition and mandamus in the Court of Appeals, to prohibit the Austin court from proceeding with the trial of the second indictment, so that the case might proceed in Laredo, and for other relief (R. 84-90).

The Court of Appeals, two to one, dismissed the appeal. The majority did not reach the merits. They thought the order of dismissal was not a "final order". They said only that the "effect of the order sought to be appealed from is simply that the United States has elected to discontinue, and has discontinued, the prosecution returned in the Southern District of Texas . . ." and "*therefore*" that the dismissal is "not final but discretionary and interlocutory and not appealable", 225 F. 2d at 332 (R. 96). The court did not separately consider the application for the writs directed to the Austin judge, but held that it "follows" that the writs must also be denied, *id.* at 333 (R. 97).

Judge Cameron dissented. He stated that, under the new rules, venue is no longer the prime "prerogative" of the Government; the district court has an obligation to supervise the choice of venue to "insure justice and equal treatment to all parties"; and that it was doubtful "~~whether that~~ purpose and that meaning have been vindicated here," *id.* at 337-338 (R. 104-106). He further said:

"The Government made its selection of the battleground in the first instance as it had a right to do. The court found that battleground to be too favorable to the Government and unfair to the de-

fendant. The court changed the battleground to one it adjudicated to be favorable to neither side. To permit the Government, under those circumstances, to repudiate the whole proceeding it had initiated and to move the scene of the fight to another place of its own selection, is to open the door to the possibility of grave abuses. *Id.* at 338 (R. 107).

"It is clear that the Court of the Southern District applied the wrong tests in deciding that the indictment first brought might be dismissed. If it had required the Government to establish a sound legal reason for the dismissal, giving due consideration to the rights of both parties, it is difficult to conclude that the right to dismiss would have been sustained, so barren is the record of any such showing. When all of the talk is boiled down, it points to the fact that the Government was wholly displeased with the prospect of a trial in a venue the court had adjudicated to be fair." *Id.* at 340 (R. 110).

Judge Cameron felt that the court had all the elements of the controversy before it, and that it should reach the merits and should "do full justice to the parties" either by ruling on the appeal or by issuing the prerogative writs so that the trial would proceed in Laredo, the venue previously fixed by order of the District Court, *id.* at 340 (R. 110).

Judge Cameron, we think, correctly and succinctly stated the basic issue in this entire proceeding by saying:

"If it be thought that the views here expressed give hospitality to the concept that the Government does not belong in a favored-litigant class, they are so intended. It is hard to conceive that a private litigant could make a test run in

was transferred and that, and that, such a transfer-  
ing, in another jurisdiction and not the authority  
under the present case, does not exist. At the  
same time, the Government was permitted and dis-  
posed of, it was improperly dismissed. The  
case was dismissed.

## VI SUMMARY OF ARGUMENT

Article 23 required that, after the presentation of  
petitioner was transferred from Corpus Christi to  
Laredo, it should have continued in Laredo. The Gov-  
ernment had no power thereafter to move for a second  
transfer. Its dismissal and reinstatement in Austin, it  
sought to create such a power for itself here, denied to  
it in terms by the Rule. Such a strategy, so long as  
it is available to the Government, creates grave possi-  
bility of abuse and constitutes a challenge to the integ-  
rity of the procedure under Rule 23. The Government  
should be bound, under the terms of the Rule, to the  
transfer to Laredo, entered upon hearing and findings  
that Corpus Christi was unfair to defendant and that  
Laredo was fair to both sides. It thus denies the Gov-  
ernment the power to shift forums at will and to exer-  
cise a final choice as to the place of trial, then it has  
learned the risks of an original unfair notion.

## III.

The dismissal of the original indictment was improp-  
erly allowed because the Laredo court was under a mis-  
apprehension as to its functions and duties under Rule  
40 in approving dismissals. The grounds for the dis-  
missal here were acknowledged by both sides, and were  
plainly improper as an evasion of the court's transfer

order and the court should thus have exercised its functions and duties under the Rule by denying leave to dismiss.

### C.

1. The dismissal order was final, within the terms of 28 U.S.C. § 1291, since it "terminated" the proceedings by virtue of Rule 48. The pendency of the second indictment in another district did not change the plenary character of the order. Petitioner was aggrieved by it, in view of the fact that it denied him the right to trial in Laredo, which the court had adjudicated to be fair to both sides. None of the purposes of the final judgment rule were served in dismissing the appeal, in view of the fact that it represented the last time the petitioner could challenge the propriety of the dismissal order. But even if the order was not final, it was appealable under the principles of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

2. Even if no appeal would lie from the dismissal order, the Court of Appeals should have compelled trial in Laredo, through the issuance of prerogative writs, as requested, to the Austin Court.

## VII.

### ARGUMENT

#### **A. The Government Should Not be Permitted to Circumvent an Order of Transfer Entered Under Rule 21(a) by Reindictment and Dismissal of the Transferred Indictment**

This case presents a highly important question in the administration of justice under the Federal Rules of Criminal Procedure. It breaks new ground. Neither this Court nor any other federal court has been called

upon to decide whether an order of transfer validly entered under Rule 21(a) can be evaded and rendered a nullity through the device of reindictment and dismissal of the transferred indictment.<sup>2</sup> The novelty of this question in the federal courts doubtless arises from the fact that, prior to the effective date of the Federal Rules in 1946, a defendant charged with crime in a federal court was unable to secure a change in venue upon the ground of prejudice in the area in which the charge was pending.<sup>3</sup> Consequently, until the adoption of Rule 21, the question of circumventing such a transfer order could not have arisen in a federal court.

The petitioner was first indicted for income tax evasion in the Southern District of Texas, Corpus Christi Division. He moved for a transfer of the proceedings under Rule 21(a), on the grounds that he would be denied a fair trial because of prejudice there. In support he submitted extensive proof. The Government opposed the transfer, and submitted its own proof. The court heard argument. It held that petitioner could not get a fair trial in the forum which the Government had chosen. It also found that the Government would be under no "handicap" by a transfer to Laredo. It entered an order transferring the case to the Laredo Division.

<sup>2</sup> It might be noted, however, that the federal courts have long condemned the practices of obtaining multiple indictments for the same offense, *United States v. Haupt*, 152 F. 2d 771, 795 (7th Cir. 1945), affirmed 330 U.S. 631 (1947), of dismissing an indictment for any reason except lack of evidence, *United States v. Doe*, 101 F. Supp. 609, 611 (D.C. Conn., 1951), and of dismissing one indictment and obtaining a second indictment for the same offense, *United States v. Jones*, 7 Alaska 378, 381-382 (1926).

<sup>3</sup> Cummings, *The Third Great Adventure*, 29 A.B.A.J. 654, 655-6 (1943).

Rule 21(c), which governs the effect of such transfer orders, is clear and explicit:

“When a transfer is ordered the clerk shall transmit to the clerk of the court to which the proceeding is transferred all papers in the proceeding or duplicates thereof and any bail taken, *and the prosecution shall continue in that district or division.*”

This is a mandatory requirement that, once there has been an order of transfer, the prosecution shall continue in the second court. In the practice of a number of the states a transfer of venue by a court invests the transferee court with exclusive jurisdiction.<sup>4</sup> The law in such states can be illustrated by that of Texas. There a change of venue is accomplished by what is called a plea of privilege. The effect of such a plea is stated in *26 Texas Jurisprudence* 102 (1933):

“... a judgment on a plea of privilege is conclusive of the issue of venue, and this is true even though the plaintiff takes a voluntary non-suit after its rendition.”

The quoted language of Rule 21(c) makes it clear that the Rule is designed to conform federal practice to this aspect of state procedure.

Although the stratagem of evading transfers of venue by reindictment and dismissal has not heretofore been before the federal courts, such practice has been severely criticized in decisions of state courts. In *Ex Parte Lancaster*, 206 Ala. 60, 89 So. 721 (1924), the defendant was indicted for murder in Walker County and, on his motion asserting prejudice, the

<sup>4</sup> See e.g., *Turner v. State*, 87 Fla. 155, 162, 99 So. 334, 336 (1924); *Keefe v. District Court*, 16 Wyo. 381, 391, 94 Pac. 459, 461 (1908).

court transferred the proceeding to Marion County. The prosecution then dismissed the indictment in Marion County and obtained a new indictment in Walker County. In forbidding trial of the second indictment, the court said (206 Ala. at 64-65, 89 So. at 724-725):

"Neither the Constitution nor the statutes of Alabama authorize the state to apply for or to secure a change of venue in any criminal case. Will the courts allow the state to secure a change of venue indirectly when it is not permitted directly to do so? What cannot be done directly by law, the law does not permit to be done indirectly. No change of venue can be granted by a court in a criminal case, except on application, petition, or motion of the defendant. The defendant must be the moving party for the change of venue, and not the state.

\* \* \*

"To give the state this right to have the trial returned to Walker county would deprive the defendant of his right to be tried in Marion county for this offense. This would allow the state a change of venue, if permitted. The defendant cannot be deprived of this right to be tried in Marion county by motion of the state for a nolle prosequi to be entered, which is granted by the court. Neither the Constitution nor the statutes of Alabama ever contemplated that the defendant could in that way be deprived of his right of trial for the offense charged in Marion county. *To permit it, the state, with the approval of the court, by entering a nolle prosequi, could accomplish indirectly what the statute directly forbids, namely, a change of the trial of the defendant on the offense charged from Marion back to Walker county, or some other county, perhaps.*

"*This court cannot approve or encourage or permit such practice. It will set no such precedent. It*

cannot permit a defendant to be liable to be harassed in that way." (Italics added)

*Coleman v. State*, 83 Miss. 290, 35 So. 937 (1904), also involved an attempt by the prosecution to obtain a transfer, otherwise denied it, by the technique of dismissal and reindictment. The Court said (83 Miss. at 298, 35 So. at 939):

"The trial could not, on the application of the state, have been transferred to any other county because this is not permitted by law, and the method here adopted is simply an attempt to do by indirection what cannot be done directly."

In short, state law is clear that the prosecution cannot create for itself a transfer power, by a misuse of the power to terminate, which is denied it in terms. We think that Rule 21 compels a similar result in the federal courts. The notes of the Advisory Committee demonstrate that transfer, where justified, is a privilege to be accorded defendants, not the Government. They state:<sup>6</sup>

"3. The rule provides for a change of venue only on defendant's motion and does not extend the same right to the prosecution . . ."

Nothing in Rule 21 permits the Government to request a transfer, either on grounds of prejudice to it or "in the interest of justice". If the Government's technique of dismissal and reindictment is sanctioned,

<sup>5</sup> See also *State v. Milano*, 138 La. 990, 991, 71 So. 131 (1916); *Keefe v. District Court*, 16 Wyo. 381, 392, 94 Pac. 459, 461 (1908).

<sup>6</sup> Notes on Advisory Committee on Rules, 18 U.S.C.A., Rule 21, p. 243.

it indeed will be enabled "to do by indirection what cannot be done directly."

Where offenses have been committed in more than one district, the Government initially has an unfettered choice to fix venue in a location of its own choosing. The defendant cannot interfere with this choice before the indictment is returned, but, after he has been indicted, protection is afforded him by Rule 21. If, as in the instant case, the Government makes an initial choice of an unfair venue, certainly it should be required to try the case in the forum which the court decides, on defendant's motion to transfer, is a fair one to both sides. Otherwise, the Government can make a succession of choices. It can begin with the worst venue for the defendant; if the case is transferred, it can retransfer the prosecution to the next most prejudiced locality; and so on. The practice threatens, just as did the transfer procedure presented in *United States v. National City Lines, Inc.*, 334 U.S. 573, 591-592 (1948), a "merry-go-round of litigation upon the issue".

In the present case, the Government had for more than twenty years tried all tax fraud cases in Austin, but it chose to obtain an indictment against petitioner in Corpus Christi. When the case was transferred to Laredo, the Government suddenly decided that it should resume its theretofore uniform practice and try petitioner in Austin. The same judge would have conducted the trial, whether it went forward in Corpus Christi or in Laredo. The Government's initial preference to try the case in Corpus Christi must have been due to its desire to avail itself of the prejudice there. Then, after the court discerned such prejudice

and found that neither side would be prejudiced by trial in Laredo, the Government decided to circumvent this finding and again to insist upon a forum of its own choice. Such shopping around for an illegitimate advantage should not be sanctioned by this Court.<sup>7</sup>

Prior to the adoption of the Federal Rules of Criminal Procedure, the Government had the final choice of venue. The persons who drafted the Rules made it plain that they desired to change such practice, saying with respect to Rule 21:<sup>8</sup>

"The effect of this provision would be to modify the existing practice under which in such cases the Government has the final choice of the jurisdiction where the prosecution should be conducted. The matter will now be left in the discretion of the court."

The court exercised its discretion here. It found that petitioner would be prejudiced in Corpus Christi. It also found, upon due consideration of the proof, that the Government would be at no disadvantage in Laredo. When the case was transferred to Laredo, the Government had all that it was entitled to—its day in court on the fair place of trial. It originally sought an unfair advantage in Corpus Christi. That advantage was taken away by the change to Laredo. If as a re-

<sup>7</sup> The language of *Hampton v. Williams*, 33 F. 2d 46, 49 (8th Cir. 1929) is applicable here: "Congress did not intend that a party could voluntarily proceed in the court where the suit was filed until he became dissatisfied and then transfer the case. It gave him the privilege to go ahead in one or the other courts, as he desired, but he could not experiment with both."

<sup>8</sup> Notes of Advisory Committee on Rules, 18 U.S.C.A., Rule 21, p. 242.

sult of picking an unfair forum it lost the chance to prosecute at Austin, the Government has learned the risks of an original unfair choice.

The Government could have sought appellate relief from the transfer order if it felt the district judge was wrong and that it really would have been prejudiced in Laredo.<sup>9</sup> Instead of proceeding in this orderly fashion, however, it attempted to circumvent the court's decision: Its action is a fundamental evasion of the integrity of the transfer procedure contemplated by Rule 21.

**B. Judge Kennerly Misconceived His Functions and Obligations in Permitting the Government to Dismiss the First Indictment Under Rule 48(a).**

Rule 48(a) provides that the Government may secure a dismissal only "by leave of court." Prior to the adoption of this Rule, the prosecution had sole discretion over the matter of dismissals. The Advisory Committee recommended that such practice be continued, but this Honorable Court rejected the recommendation and inserted the requirement that leave of

<sup>9</sup> As the Court pointed out in *United States v. United States District Court*, 209 F. 2d 575, 576 (6th Cir. 1954), with respect to the propriety of a transfer order under Rule 21(a):

"Mandamus or a proceeding in the nature of mandamus is the appropriate procedure by which to decide the issue presented."

Thus, the Government can scarcely argue that it could not have tested the order here in an orderly and proper fashion. See also *General Portland Cement Co. v. Perry*, 204 F. 2d 316 (7th Cir. 1953); *Paramount Pictures v. Rodney*, 186 F. 2d 111 (3d Cir.), cert. den. 340 U.S. 953 (1951).

the court be had.<sup>10</sup> As a result, the Committee's final notes state:<sup>11</sup>

"The first sentence of this rule will change existing law. The common-law rule, that the public prosecutor may enter a nolle prosequi in his discretion, without any action by the court, prevails in the federal courts. . . . This provision will permit the filing of a nolle prosequi only by leave of court. This is similar to the rule now prevailing in many states."

Clearly, the Rule contemplates that the court is to assume more than a passive role in approving dismissals. The Government's motion must receive the sanction of the court.<sup>12</sup>

<sup>10</sup> 225 F. (2d) at 337, note 8 (R. 105).

The Advisory Committee on Rules of Criminal Procedure originally recommended that the Court adopt what is now Rule 48(a) in the following form:

"The Attorney General or the United States attorney may file a dismissal of the indictment or information with a statement of the reasons therefor and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant." Federal Rules of Criminal Procedure, Preliminary Draft (1943).

The Committee thus originally contemplated no change in the existing law. It said, with respect to its recommendation: "In the federal courts the prosecutor retains his commonlaw power to enter a *nolle prosequi* without the consent of the court." *Id.* at 191.

<sup>11</sup> Notes of Advisory Committee on Rules, 18 U. S. C. A., Rule 48, p. 537.

<sup>12</sup> See *United States v. Doe*, 101 F. Supp. 609 (D. C. Conn. 1951), wherein the court denied such a motion on the ground that

As the dissenting judge in the Court of Appeals demonstrated,<sup>13</sup> Judge Kennerly failed to recognize his obligations under the new rules. He stated that during his 24 years on the bench, he had always granted motions to dismiss. He felt that if he had "discretion", he "must exercise it" and "allow" the indictment to be dismissed (R: 79).

Judge Kennerly clearly assumed that he had no discretion to deny the Government's motion to dismiss, or that if he had a measure of discretion, it was so limited and circumscribed as to be practically unavailable. We respectfully submit that this is an erroneous view of the Rule. This Court overruled its Advisory Committee and required that "leave of court" be obtained prior to dismissal of an indictment for the purpose of directing the district courts to exercise affirmative judgment in the interests of justice and or-

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the Government had not shown the reasons for the dismissal. In this respect the court said (*id.* at 611):

"In my view, the rule contemplates that the court shall exercise a sound discretion in the premises. And on fundamental principles, at least in the absence of very exceptional circumstances as for instance, where the defendant has received a substantial sentence for another phase of the same offense, a court may not properly approve a dismissal of the entire case against any given defendant unless satisfied that the Government lacks sufficient evidence to warrant a prosecution. Especially is this so where the matter is before the court on indictment as distinguished from information." (Italics added).

On the necessity and importance that district judges exercise a firm hand in the supervision of dismissals, see Yankwich, *Increasing Judicial Discretion in Criminal Proceedings*, 1 F. R. D. 746, 747-752 (1941).

<sup>13</sup> 225 F. 2d at 337 (R: 105).

derly procedure. It did not insert the requirement as a mere formality. Indeed, the present case is precisely the kind of situation which demonstrates the wisdom of the requirement, and in which the trial court should have used its power to refuse dismissal. Dismissal was sought by the prosecution for reasons which are distinctly improper. It was sought in order to circumvent an order of the court, entered on the evidence, fixing the fair place of trial. It was sought in order to obtain for the Government, in fact if not in form, a right to transfer a pending criminal case to another venue, a right which Rule 21 gives exclusively to the court ~~and~~ exclusively on motion of the defendant; and which the Rule deliberately withholds from the Government.

We respectfully submit, therefore, that Judge Kennerly should have exercised his power with respect to the motion for leave to dismiss, and should have denied leave in order to protect the prior order of the court fixing the place of trial, and to secure to the defendant the benefit of that order. Failure to do this amounted to judicial condonation of a device by which the Department of Justice seeks to obtain for itself, and to deny to the courts, the power to choose the forum to which trial of a criminal case may be transferred, contrary to the Rules.

In granting leave for dismissal of the indictment, Judge Kennerly stated (R. 79):

"... I do not think that the defendant, either in the hearing this morning or in this enormous record on the question of change of venue, has shown any reasons why this case should not be dismissed."

This is clearly incorrect. The reasons why defendant opposed the dismissal were established by the record. The facts are not in dispute. Indeed, the very facts relied upon by the Government to justify the dismissal—that is, to permit the case to be tried in a forum more favorable to the Government than that fixed by the court's order—are the facts which demonstrate that dismissal should not be allowed.

The only reason for the dismissal which the Government advanced was that, since the transfer of the case to Laredo, it had developed a sudden and most acute preference for trying the case in Austin. Surely this is not a sound basis for dismissing an indictment and thereby sanctioning the circumvention of a valid transfer order. Rule 21(a) and the rulings of courts thereunder are not subject to being overruled by the Attorney General and his assistants. The requirement of Rule 48(a) that leave of court be obtained before dismissal of an indictment was clearly designed to prevent abuse of the dismissal power of the prosecutor for the purpose of obtaining improper advantages. Using that power to circumvent an order of court and to obtain, in effect, the transfer of trial of a case, is certainly improper.

#### **C. The Court of Appeals Had Jurisdiction to Grant Petitioner Full Relief.**

As we have pointed out, petitioner carried an ordinary appeal to the Court of Appeals under 28 U. S. C. § 1291, and he also sought prerogative writs in that court. The majority dismissed the appeal and denied the writs "for want of finality in the order appealed from", 225 F. 2d at 332 (R. 97). The writ of certiorari thus brings to this Court two pro-

cedural issues: (1) the appealability of the dismissal order in the Southern District Court, and (2) the power of the Court of Appeals to supervise the proceeding on the second indictment in the Western District by prerogative writs. We submit that the dismissal order was a final, appealable order. We also submit that regardless of its finality the Court of Appeals should have granted petitioner full relief by issuance of the prerogative writs prayed for.

### I. Appealability.

(a) *Finality.* 28 U. S. C. § 1291 establishes appellate jurisdiction of "final decisions" of the district courts. Finality, of course, "is not a technical concept of temporal or physical termination", *Cobbledick v. United States*, 309 U. S. 323, 326 (1940); whether a motion and order "is to be treated as independent and plenary or as merely a procedural step in a pending trial must be determined by particular circumstances." *United States v. Wallace & Tiernan Co.*, 336 U. S. 793, 802 (1949). In the circumstances of the Southern District proceedings, nothing could have been more final than this dismissal order.

The effect of such an order is made clear by Rule 48 itself. This provides that when the prosecutor, with leave of court, dismisses an indictment, "the prosecution shall thereupon terminate."<sup>14</sup> (*Italics added.*)

<sup>14</sup> Compare *St. Louis, I. M. & S. Ry. Co. v. Southern Express Co.*, 108 U. S. 24, 28 (1883): a judgment "is final for the purposes of an appeal . . . when it *terminates* the litigation between the parties . . ." (*italics added*). This phrasing of the rule has often been repeated by the court, see, e.g., *Berman v. United States*, 302 U. S. 211, 213 (1937); *Catlin v. United States*, 324 U. S. 229, 233 (1945).

So here. Nothing remained to be done: the docket was closed, the bond cancelled and the order of the court granting the bill of particulars made moot. The statute of limitations was no longer tolled by this proceeding.

The doctrine of finality is designed to protect and guard against piecemeal appeals, with concomitant delay of trial in the lower courts. But this was not a piecemeal appeal. The court could enter no other orders in this docket from which an appeal could be taken. The appeal from the judgment of the Southern District Court represented petitioner's last and final opportunity to seek a review; plainly he cannot ask the Court of Appeals to review orders, including the dismissal order, entered in the Laredo docket of the Southern District on an appeal from a possible future conviction in the Austin Division of the Western District. In short, to deny finality to the order of dismissal would render petitioner "powerless to avert the mischief of the order". *Pearlman v. United States*, 247 U. S. 7, 12 (1918), without serving any of the purposes of the final judgment rule.

The Government in its opposition to our Petition for Certiorari, however, urged the Court to view the Southern District proceeding "in conjunction with the second indictment," and argued that in this guise the dismissal order became merely one "step in the criminal proceeding." (Br. Opp. 9). But the second indictment with respect to the same cause of action could not deprive the order dismissing the first indictment of its finality, for, although they pertained to the same alleged offense, the two indictments represented separate suits in different courts which, from

the procedural standpoint, were completely unrelated. Indeed, we know of no method by which the record relating to the transfer order and the dismissal of the first indictment could be imported into and made a part of the proceedings on the second indictment. Pendency of other, separate proceedings cannot change the final and plenary character of the dismissal order entered on the docket of the proceeding in the Southern District.

(b) *Aggrievement*. In opposing certiorari, the Government also argued that, even though the order of dismissal might be a final order, petitioner was not "aggrieved" by it and, hence, could not appeal. It cited *Lewis v. United States*, 216 U. S. 611 (1910), in support of the alleged principle that a defendant cannot be aggrieved by dismissal of an indictment. However, the *per curiam* decision there was based upon the fact that the subject of the appeal was moot, and the case does not announce any general doctrine to the effect that a defendant cannot be aggrieved by the dismissal of an indictment.

The dismissal order here is analogous to a judgment of non-suit in a civil action. The courts have long permitted appeals by defendants from voluntary nonsuits by civil plaintiffs, regardless of the fact that such nonsuits do not reach the merits of the controversy. As said in *Cybur Lumber Co. v. Erkhart*, 247 Fed. 284, 285 (5th Cir. 1918):

"when [the plaintiff] moves for a voluntary non-suit, and a judgment of nonsuit is entered over the protest of the defendant, the judgment is a final one and reviewable at the instance of the de-

defendant, though not res judicata of the merits of the controversy.

The defendant here obtained a final order transferring the case to Laredo. If the effect of this order is denied to him, he is certainly aggrieved, and he is entitled to appeal from the order, purporting to withdraw the benefits of the transfer.

*c. Appealability as a collateral order under Cohen.*

But, even if it is assumed that the dismissed order was not a final order, the Court of Appeals should have granted relief to petitioner. In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949), and in *Swift & Co. Packers v. Compania Colombiana del Caribe*, 339 U. S. 684 (1950), this Court held that appeals will lie from non-final orders in certain circumstances. In reviewing such an order in the former case, the court said (337 U. S. at 546):

"But this order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively to review the present order and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably."

Precisely such a situation exists in the case at bar. The order dismissing the Laredo suit did not make any step toward final disposition of the merits of the Austin indictment and could not be merged in final judgment in

<sup>15</sup> See also *Massachusetts Fire & Marine Ins. Co. v. Schwick*, 58 F. 2d 130, 131-132 (8th Cir. 1932); *Connecticut Fire Ins. Co. v. Manning*, 177 Fed. 893, 894 (8th Cir. 1910); and *Iowa-Nebraska Light & Power Co. v. Daniels*, 63 F. 2d 322, 324 (8th Cir. 1933).

the Austin case. When judgment is entered in the Austin case, it will be too late to review effectively the dismissal order, since the question on appeal will be, not whether the Laredo indictment was properly dismissed, but whether petitioner received a fair trial in Austin. As a result of this, the right conferred upon petitioner by Rule 21 will be irreparably lost. Consequently, even if the dismissal order is deemed non-final, it falls squarely within the principles laid down in the *Cohen* and *Swift* cases and is reviewable by way of appeal.

## 2. Prerogative Writs.

However, even in the event that the court below had no jurisdiction over the appeal, it nonetheless could and should have granted relief through the issuance of prerogative writs to the Western District Court. The use of a second indictment in the Western District to circumvent the valid and binding transfer of the first was in violation of Rules 21 and 48. The judge of the Western District should have refused to proceed, and should have stayed or transferred the proceedings to Laredo. Mandamus and prohibition were therefore proper remedies to compel adherence to the provisions of the Rules.<sup>16</sup> The court below could have ordered the stay, or the transfer of the proceedings to the proper court pursuant to petitioner's district court motion made under Rule 21(b). Compare *Virginia v. Rives*, 100 U. S. 313 (1880); *Maryland v. Soper*, 270 U. S. 9 (1926).

<sup>16</sup> Compare *United States v. Smith*, 331 U. S. 469 (1947), where this Court reversed the denial of mandamus in the Court of Appeals, in order to compel the district court to vacate its order granting a new trial in violation of Rule 33, F. R. Crim. P.

To use the prerogative writs in this fashion would be entirely proper. The issue of whether or not the Austin court properly proceeded with the second indictment and refused to transfer to Laredo cannot be raised on a future appeal. In *Ford Motor Co. v. Ryan*, 182 F. 2d 329, 330 (2d Cir.), cert. den., 340 U. S. 841 (1950), the court held that it had jurisdiction to grant the writs in connection with an order refusing to transfer a civil case since:

"... any error in the interlocutory order would probably be incorrigible on appeal, for petitioners could hardly show that a different result would have been reached had the suit been transferred."<sup>17</sup>

Likewise, in the instant case, if petitioner can seek relief only by an appeal at the termination of the Austin case, he could not show that a different result would have been reached if the case had been tried in Laredo, and he will be confined to the narrow issue of whether he received a fair trial in Austin. For this reason we think that the prerogative writs prayed for were within the jurisdiction of the Court of Appeals, and should have issued.

<sup>17</sup>In *Atlantic Coast Line R. Co. v. Davis*, 185 F. 2d 766 (5th Cir. 1950), the Court of Appeals for the Fifth Circuit has also recognized and applied the principles announced in the *Ryan* case. See also 6 Moore's *Federal Practice* (2d ed. 1953) 96-101, and particularly cases collected in note 65; Wolfson, *Extraordinary Writs in the Supreme Court since Ex Parte Perù*, 51 Col. L. Rev. 977, 990 (1951).

## VIII.

## CONCLUSION.

The fact that the Government is a litigant does not confer advantages upon it. The fact that a defendant is a prominent figure does not justify putting him at a disadvantage. However, in the case at bar the Government sought to gain an advantage and subject petitioner to a disadvantage by departing from its custom of more than a score of years and indicting petitioner in Corpus Christi. When the Southern District Court rectified this overreaching by transferring the indictment to Laredo, a venue it expressly found to be fair to both sides, the Government again sought an advantage and to place the petitioner at a disadvantage by obtaining the Austin indictment and dismissing the one transferred to Laredo. In so doing, it flaunted the order of transfer, overruled the court's determination that Laredo would be fair to both sides, and sought to set itself up as the final arbiter in the matter of venue, in plain contravention of Rules 21 and 48.

Petitioner does not seek to avoid a trial for his purported offense. He merely seeks a trial on that offense in the venue to which he is entitled by the binding order of transfer entered after an elaborate trial of the issue, and which had been determined by plenary judicial proceeding to be fair to him as well as to the prosecution. He prays this Court in the exercise of its supervisory power:

1. To reverse the judgment of the Court of Appeals, and to remand the cause to the District Court for the Southern District of Texas, Laredo Division, with instructions to reinstate the indictment in *United States v. Parr*, Criminal No. 3866.

2. To reverse the judgment of the Court of Appeals, and to direct the issuance of prerogative writs to the District Court for the Western District of Texas, Austin Division, and to Honorable Ben H. Rice, Judge of said Court, directing him to stay further proceedings in *United States v. Parr*, Criminal No. 17056, or to dismiss the indictment, or to transfer it to the Laredo Division of the Southern District of Texas in the interest of justice.

3. To grant such other relief and process as may be necessary or appropriate.

Respectfully submitted,

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